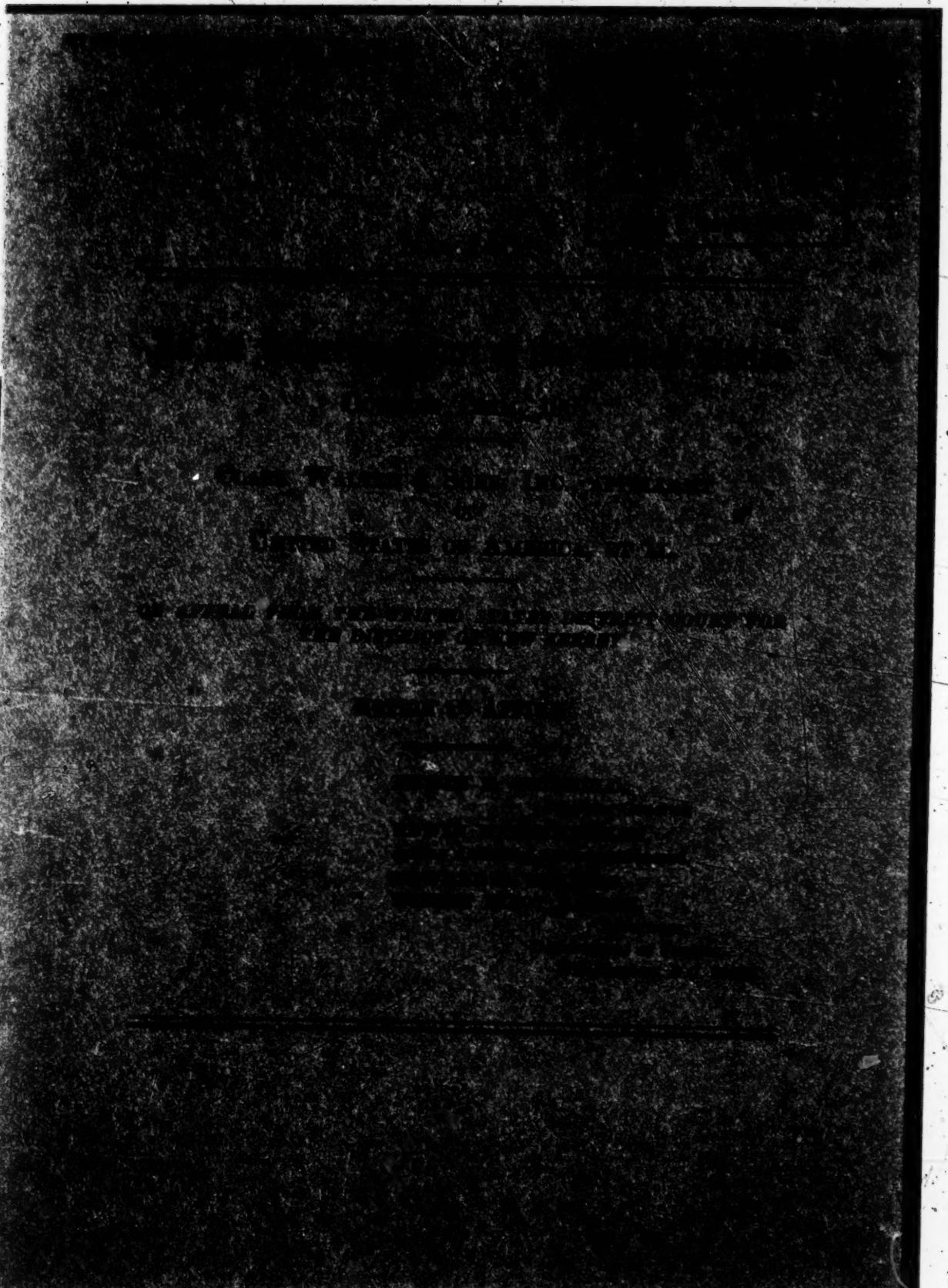

INDEX

	Page
Statement	1
Argument	5
Conclusion	10

CITATIONS

Cases:

Amalgamated Utility Workers (C.I.O.) v. *Consolidated Edison Co. of New York*, 309 U.S. 261	6
Cascade Natural Gas Corp. v. *El Paso Natural Gas Co.*, 386 U.S. 129	5, 9
Central Bank and Trust Co. v. *United States*, Nos. 1269 and 1270, O.T., 1967 (decided May 27, 1968)	9
City of New York, et al. v. *United States*, Nos. 1141 and 1146, O.T., 1967 (decided April 22, 1968)	8, 9
Lupton Mfg. Co. v. *United States*, 388 U.S. 457	9
Missouri-Kansas Pipeline Co. v. *United States*, 312 U.S. 502	6
New Jersey Communications Corp. v. *AT&T* (S.D.N.Y., No. 67 Civil 3622)	10
Pioneer National Title Ins. Co. v. *United States*, 385 U.S. 1022	9
Sutphen Estates v. *United States*, 342 U.S. 19	10
Swift & Co. v. *United States*, 276 U.S. 311	6
United States v. *ASCAP (Metromedia, Inc.)*, 341 F. 2d 1003, certiorari denied, 382 U.S. 877	6
United States v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, affirmed *per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580	8
United States v. *Borden Co.*, 347 U.S. 514	6
United States v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002	6
United States v. *R.C.A.*, 186 F. Supp. 776, appeal dismissed *sub nom. Westinghouse Broadcasting Co.* v. *United States*, 364 U.S. 518	6
United States v. *Ward Baking Co.*, 376 U.S. 327	6

308-781—68

Statutes: Page

Sherman Act, 15 U.S.C. 1, 2 and 3 2

15 U.S.C. 4, 26 8

Miscellaneous:

Federal Rule of Civil Procedure 24 ..... 4, 7, 8, 10

4 Moore's Federal Practice, 24.10(4) (2d ed.) 10

Restatement, *Judgments*, §§ 79, 93 6

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1404

CLARK WALTER & SONS, INC., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from an order of the district court (J.S. 1a) denying appellant's motion to intervene as a party plaintiff in the proceedings below for the purpose of enforcing by contempt proceedings a consent decree entered twelve years ago in a government antitrust action.

1. On January 14, 1949, the United States filed a civil antitrust complaint against Western Electric Company, Inc. and American Telegraph & Telephone

Company (hereinafter sometimes referred to as "AT&T" and "the Bell Companies"). AT&T and its subsidiaries constitute the largest telephone operating company in the United States; Western Electric is the Bell system's manufacturing branch. The Government alleged that the defendants were violating Sections 1, 2 and 3 of the Sherman Act (15 U.S.C. 1, 2 and 3) by monopolizing the manufacture of telephone equipment and by preventing the competitive development of alternate methods of communication through various agreements, patent license restrictions and other means.

After extended negotiations the parties reached a settlement which was embodied in a consent decree which the district court entered on January 24, 1956 (J.S. 6a). The decree is complex and covers many areas, including the types of business in which the companies may engage, patents and patent licensing, allocation of fields of manufacture, disclosure of technical know-how and other matters. It expressly retains jurisdiction in the district court "for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders * * *" as might be necessary to carry out its provisions (§ XVII, J.S. 24a–25a). Non-parties are allowed to invoke the court's jurisdiction for the limited purpose of having the court set royalties and other terms under patent licenses and other agreements which the decree makes mandatory (J.S. 15a, 22a–23a).

Section V is the portion of the decree pertinent here. It enjoins AT&T from "engaging, either di-

rectly, or indirectly through its subsidiaries other than Western and Western's subsidiaries, in any business other than the furnishing of common carrier communications services * * *" (J.S. 11a). Section II(i) defines "common carrier communications services" as follows (J.S. 8a):

> (i) "Common carrier communications services" shall mean communications services and facilities, other than message telegram service, the charges for which are subject to public regulation under the Communications Act of 1934, or any amendment thereof, or would be subject to such regulation thereunder if such a service or facility were furnished in interstate commerce; and shall also include any communications service or facility, other than message telegram service, the charges for which are or become subject to regulation under existing or future laws of any state, territory, or the District of Columbia, but only in the jurisdiction or jurisdictions in which the charges for such service or facility are subject to regulation.

The Department of Justice interprets "common carrier communications services" as so defined to mean any communications service subject to actual regulatory jurisdiction, federal or local. The purpose of this definition is to limit AT&T's business to regulated fields, so that state and federal regulation will be available to protect the public against competitive abuses and excessive or discriminatory rates.

2. Appellant is a distributor of private communication systems, including hospital nurse call systems, in northern New Jersey (J.S. 38a–42a). In July

1967, appellant complained to the Department of Justice that AT&T was violating Section V of the consent decree, which appellant construed as barring the Bell Companies from entering the field of private communications. According to the appellant's representations, the Bell Companies had begun to introduce in appellant's territory an audio visual nurse call system that competed with one of its products. It requested that the Department enforce Section V to prevent the Bell Companies from marketing this device.

After receiving several assurances from the Department that its complaint was being studied (J.S. 45a–46a), appellant, on January 22, 1968, filed motions to intervene as a plaintiff under Federal Rule of Civil Procedure 24 and (J.S. 30a) "to enforce judgment and to hold defendants in contempt." The United States and the defendants opposed appellant's application to intervene.[1]

After full hearing the district court denied appellant's motion in an oral opinion. It expressly declined to reach the merits of appellant's claim that the

[1] In its opposition, the government advised the district court that in its view "the activities complained of are not barred by the consent decree insofar as the nurse call services have been offered by AT&T under tariffs which subject the charges therefor to regulation." Memorandum of the United States in Opposition to the Motion of Clark Walter and Sons to Intervene, p. 3. Apparently, no tariff for this service has been filed by the Bell Companies in New Jersey (J.S. 44a), but their counsel does not admit that the service has been offered there (transcript, Feb. 26, 1968, p. 20).

decree had been violated (J.S. 3a).[2] The court recognized the propriety of allowing intervention in "extraordinary circumstances" such as existed in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (J.S. 4a). Finding (J.S. 3a) that "[t]he Government has not repudiated its obligation to act in the public interest in the enforcement of the decree," and noting that the action was begun 19 years ago and had been settled 12 years ago, the court ruled that it would not serve the public interest to permit a non-party to intervene to enforce the consent decree. Such interventions, the court concluded, would discourage consent decrees. "Moreover," the court added, "if every party who could allege that it was the beneficiary of an antitrust decree could enter the picture to enforce the decree, we would have a volume of litigation that would be almost impossible for the Court to handle" (J.S. 4a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration. The district court correctly denied intervention as of right and did not

[2] In its brief in support of its motion to intervene and in oral argument to the district court (transcript, Feb. 26, 1968, p. 18), appellant expressly said it was not then asking for a ruling on the merits. The district court observed, "It is contended here that the private communications system does not fall within the category of 'common carrier communications system,' and there seems to be very little doubt about that. Although I should qualify that statement by adding to it that the observation is made only on the basis of what has come to my attention through the moving papers. I don't intend that comment to indicate any opinion as far as the merits are concerned." (J.S. 2a–3a). Thus there is no basis for appellant's suggestions (J.S. 6, 10) that the court below believed AT&T had violated the decree.

abuse its discretion in denying permissive intervention.

1. Appellant was not a party to the United States' suit to enforce the antitrust laws against AT&T and Western Electric, and it took no part in the negotiation of the consent decrees approved by the district court twelve years ago. This is not a case such as *Missouri-Kansas Pipeline Co.* v. *United States*, 312 U.S. 502, where the decree provided for its enforcement by someone other than the United States. This decree permits a non-party to appear here only if it is unable to reach an agreement with AT&T as to the terms of a licensing agreement made mandatory by the decree (Pet. 15a, 22a–23a).

In these circumstances, appellant lacks standing to initiate contempt proceedings. *United States* v. *ASCAP (Metromedia, Inc.)*, 341 F. 2d 1003 (C.A. 2), certiorari denied, 382 U.S. 877; cf. *Amalgamated Utility Workers (C.I.O.)* v. *Consolidated Edison Co. of New York*, 309 U.S. 261.[1]

This result rests upon sound reasons. The Attorney General has, and must have, broad discretion to decide when to initiate suits under the antitrust laws and how negotiated consent decrees are to be administered and enforced. *Swift & Co.* v. *United States*, 276 U.S. 311, 331–332; *United States* v. *Borden Co.*, 347 U.S. 514, 519; *United States* v. *Ward Baking Co.*, 376 U.S. 327. Thus, in the *Metromedia* case, *supra*, the court of appeals rejected a third party's attempt—such as appellant's—to enforce a government anti-

[1] See, also, *United States* v. *R.C.A.*, 186 F. Supp. 776 (E.D. Pa.), appeal dismissed *sub nom. Westinghouse Broadcasting Co.*, v. *United States*, 364 U.S. 518; *United States* v. *Paramount Pictures, Inc.*, 75 F. Supp. 1002–1004 (S.D.N.Y.); cf. Restatement, *Judgments*, §§ 79, 93.

trust decree through independently initiated contempt proceedings. The court observed that the Attorney General's discretion "requires continuing control over the suit to determine, for instance, when modification of the decree might be a preferable alternative to attempting to enforce it through one or more contempt proceedings. * * * Leaving the choice and power to enforce or modify in the government's hands achieves a desirable result. It forecloses the possibility that a multitude of parties with conflicting interests will become entangled in subsequent proceedings in the action, and at the same time the continuing government supervision affords those parties affected by the decree sufficient protection of their rights" (341 F. 2d at 1008).

These considerations are, as the court below observed (J.S. 4a), particularly apt here. AT&T's operations, and the decree in this case, are nationwide in scope. There are many who might feel themselves aggrieved by a practice of AT&T. All have private remedies that are available independently of the consent decree. But when it comes to instituting contempt or other enforcement proceedings, it is the Attorney General who is charged with, and uniquely able to implement, the responsibility of investigation and balancing the many conflicting considerations, so that he alone should have the standing to institute contempt and other proceedings for enforcement of the consent judgment.

2. Federal Rule of Civil Procedure 24(a)(2) permits intervention when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter

impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. Appellant's ability to protect its interest in the general subject matter of the government's suit—AT&T's competitive practices—is not impaired or impeded in any practical sense simply because it cannot enforce the government's consent decree in this case. Nothing prevents appellant from obtaining the full measure of the injunctive relief it seeks—and treble damages as well—by filing its own suit under the antitrust laws. (15 U.S.C. 4, 26.)

Of course, if appellant could proceed under the consent decree, it might be unnecessary for it to pursue the private antitrust remedies Congress has given it. But it does not follow that requiring appellant to follow such independent course "impair[s] or impede[s]" its ability effectively to protect its own interest within the meaning of Rule 24(a)(2). On the contrary, where the interest sought to be protected through intervention is the avoidance of another independent suit, we submit that the thrust of the Rule is to guarantee participation only where the failure to enforce the extant decree may have some direct, affirmatively detrimental impact upon the conduct of an independent suit. The lack of such collateral benefits as would flow from a contempt citation here does not constitute the kind of impairment or impediment the Rule is designed to avoid. Cf. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432, 438 (C.D. Calif.), affirmed *per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580; *City of New York, et al.* v. *United States*, Nos. 1141 and 1146, O.T., 1967 (Motion to Affirm granted April 22, 1968). Thus, where

private party seeks intervention in a government
titrust suit, because it is dissatisfied with the At-
rney General's conduct of the litigation or interpre-
tion of the decree, intervention normally should be
nied.[4]

This result is entirely consistent with the decision
Cascade Natural Gas Corp. v. *El Paso Natural Gas*
., 386 U.S. 129. In that case, intervention was held
propriate because the government had consented to
lief short of the divestiture directed by this Court's
rlier mandate. Moreover, there could be only
e divestiture, as a practical matter, and the inter-
nor's private right of action was therefore not a
actical alternative to intervention. Such special cir-
mstances meant that intervention was the only effec-
e method by which third parties could protect their
terest in the character of the divested business.[5]

Compare *Cascade Natural Gas Corp.* v. *El Paso Natural*
Co., 386 U.S. 129, with *United States* v. *Blue Chip Stamp*
, *supra*; *Lupton Mfg. Co.* v. *United States*, 388 U.S. 457;
neer National Title Ins. Co. v. *United States*, 385 U.S.
2; *City of New York, et al.* v. *United States*, Nos. 1141 and
6, O.T., 1967 (decided April 22, 1968). Cf. *Central Bank and*
st Co. v. *United States*, Nos. 1269 and 1270, O.T., 1967
cided May 27, 1968).

The Department has chosen to implement its concern with
ons of AT&T and other carriers which appear unreasonably
estrict competition in communications services and equipment
urging in a number of pending administrative proceedings
elimination or modification of tariff restrictions which pre-
independent suppliers (like appellant) from selling equip-
t to subscribers which could be used with, and attached to,
regular telephone system. This solution would remove present
iers to competition in appellant's field. This course is being
ued before the Federal Communications Commission in the
ler-phone investigation, F.C.C. Docket Nos. 16942, 17073, and
ne Federal Communications Commission's inquiry into com-
r-communications, F.C.C. Docket No. 16979.

3. The same considerations demonstrate that the district court did not abuse its discretion in denying permissive intervention under F.R. Civ. P. 24(b). Cf. *Sutphen Estates* v. *United States*, 342 U.S. 19, 23; 4 Moore's Federal Practice, 24.10(4) at 62 (2d ed).[6]

CONCLUSION

The order of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

EDWIN M. ZIMMERMAN,
Acting Assistant Attorney General.

HOWARD E. SHAPIRO,
ROBERT ELIOT EASTON,
Attorneys.

JUNE 1968.

---

[6] Appellant also urges that the decision below is inconsistent with *New Jersey Communications Corp.* v. *AT&T* (S.D.N.Y., No. 67 Civil 3622), (unreported, reprinted at J.S. 47a). In that case a complaint by a third party based on the same decree involved here was dismissed by the United States District Court for the Southern District of New York on the ground that exclusive jurisdiction to enforce the decree was vested in the court below. In so doing, the court remarked (Pet. 52a) that the plaintiffs there could file an independent antitrust action or seek "to intervene in the anti-trust action in which the [consent] judgment was entered * * *." But even if this *dictum* is thought to reflect a view that such intervention should be allowed, it does not take account of the authorities discussed in this motion.

U.S. GOVERNMENT PRINTING OFFICE: 1968